IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. [illegible]

ROBERT C. HUTCHERINGTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

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No.

ROBERT C. HETHERINGTON,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Robert C. Hetherington, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURTS BELOW.

The judgment, conviction and sentence were entered and imposed by the United States District Court for the Northern District of Illinois, Eastern Division, on October 22, 1959, and the motion to vacate sentence and for leave to withdraw the guilty plea was denied on October 23,

1959. They are not reported, but appear in the printed Appendix filed with, and certified by, the Clerk of the United States Court of Appeals for the Seventh Circuit as a part of the record, and transmitted herewith.

No opinion was rendered by the District Court. The opinion of the United States Court of Appeals for the Seventh Circuit, affirming said judgment, was filed June 22, 1960, and is not yet reported, but is set forth in Petitioner's Appendix hereto (*Infra*, pp. 1A-7A), and in the certified copy of the record.

An additional opinion of the United States Court of Appeals for the Seventh Circuit, denying the suggestion for rehearing *en banc*, was filed on August 3, 1960, and is not yet reported, but is set forth in Petitioner's Appendix hereto (*Infra*, p. 8a), and in the certified copy of the record. The orders denying the petition for rehearing and the suggestion for rehearing *en banc* were filed on August 1, 1960 and are not yet reported, but are set forth in Petitioner's Appendix hereto (*Infra*, pp. 10a-11a), and in the certified copy of the record.

JURISDICTION.

The order of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was filed on June 22, 1960. On August 1, 1960, it was ordered that the petition for rehearing be denied. (These orders appear in Petitioner's Appendix hereto (*Infra*, pp. 10a-11a). This petition is filed within thirty days of the denial of the petition for rehearing in the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED.

1. Is an affidavit of bias and prejudice filed by the defendant in a criminal prosecution, pursuant to the provisions of Section 144 of Title 28, United States Code, which recites that a trial judge had evidenced a personal bias and prejudice against him, the defendant, and a personal bias and prejudice in favor of the government, and states as his reason for this belief that, during the pendency of motions to dismiss, for discovery and production, and for a bill of particulars, the prosecutor assigned to the case and the special agent who investigated the case, out of the presence of the defendant and his counsel, and without notice to either, met with the judge to whom the case was assigned and discussed the quantum, nature and theory of the government's proof in the case, sufficient to establish that the judge was so personally biased and prejudiced against the defendant and in favor of the plaintiff, the United States of America, as to require him to reassign the case?

2. Does not a timely motion under 28 U.S.C. 144, based on the ground, *inter alia*, that subsequent to, and during, the pendency of a plea of "not guilty", the trial judge, the prosecutor and a government agent, who was the chief prospective prosecution witness, had a secret conference in chambers, without notice to the petitioner or his counsel, wherein the quantum, nature and theory of the government's proof in the case against the defendant, require the trial judge's disqualification as being "presumptively prejudicial"?

3. Was the trial judge deprived of power, right and jurisdiction to proceed further in the case, by reason of the filing of a timely and sufficient affidavit of bias and

prejudice, and the orders, judgment and sentence entered by the judge after the filing of such affidavit of bias and prejudice thereby rendered null and void and of no effect?

4. Is the trial judge's loss of jurisdiction to proceed further in the case, as a result of the filing of a timely and sufficient affidavit of bias and prejudice, waived by the defendant's subsequent withdrawal of his plea of not guilty and his entry in its stead of a plea of guilty?

5. Is a defendant's plea of guilty, entered during the course of his trial, after he had offered evidence of his illness and physical inability to continue with the trial, and expressed the fear that a continuance of the trial might be fatal to him, and after the denial of his motion for a mistrial, on the grounds of illness and his physical inability to continue with the trial, and where he stated to the court at the time of entering his plea of guilty, "Well, I just can't go on with this", a plea of guilty made voluntarily and without coercion?

6. Is there abuse of judicial discretion in denying leave to withdraw a guilty plea, *without hearing*, on defendant's claim that his plea was induced by his bad health and recurring attacks of cardiac illness, which had so weakened the defendant that he did not believe he could endure further participation in the trial by reason of substantial mental disturbance, by reason of the threat and fear that he could not survive the trial, by reason of an irrational impulse caused by mental disturbance and physical fear, and by reason of his belief, from remarks of the trial judge and the prosecutor in off-the-record discussions, as related to him by his counsel, that he would not receive a sentence of imprisonment; and does not such a motion *require* a hearing under the decisions of this Court?

STATUTES INVOLVED

The statute involved herein, 28 U.S.C. 144, provides as follows:

§ 144. *Bias or prejudice of judge.*

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Federal Rules of Criminal Procedure, Title 18, United States Code:

Rule 11. Pleas. A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, *and shall not accept the plea without first determining that the plea is made voluntarily* with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. (Emphasis added.)

Rule 32(d), Withdrawal of Plea of Guilty... A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

STATEMENT OF THE CASE.

The petitioner, Robert C. Hetherington, was indicted on March 12, 1959. The indictment charged a wilful and knowing attempt to defeat and evade income taxes for the years 1952, 1953 and 1954, in violation of Section 145(b) of the Internal Revenue Code of 1939 and Section 7201 of the Internal Revenue Code of 1954.

The petitioner made a timely motion to disqualify the trial judge, pursuant to 28 U.S.C. 144, on August 27, 1959, which motion was denied on September 8, 1959, and trial proceeded.

During the course of the trial, which commenced on September 8, 1959, the petitioner entered a plea of guilty on September 22, 1959.

On October 22, 1959 the trial judge sentenced the petitioner to one year and a day, and a fine of $10,000.00 was imposed.

The petitioner's motion to suspend sentence and place him on probation or, in the alternative, to grant a stay for such period of time as would permit a determination of his physical condition, was denied. The motion of the petitioner for an order vacating the judgment and sentence was denied. The renewal of the motion of the petitioner for an order by the court to disqualify the trial judge for alleged bias and prejudice, filed on August 27,

1959, was not considered, the trial judge stating that his ruling had been made on September 8, 1959. The motion of the petitioner for an order permitting the withdrawal of his plea of guilty, on the ground that it was involuntarily entered, was denied without hearing. A motion to admit the petitioner to bail was denied. Application for bail made to the United States Court of Appeals for the Seventh Circuit was granted on October 23, 1959 in the amount of $1,000.00.

STATEMENT OF FACTS.

On March 12, 1959, petitioner was indicted in the Northern District of Illinois, Eastern Division, for wilfully attempting to evade and defeat his income tax for the years 1952, 1953 and 1954 (App. 10, 11). Petitioner entered a plea of not guilty on April 3, 1959 (App. 13). After a hearing on motions to dismiss the indictment, for a bill of particulars, and for production of documents, the case was continued for trial until September 8, 1959 (App. 17).

Petitioner, on August 25, 1959, pursuant to the provisions of Section 144 of Title 28, United States Code, moved that the district court judge, to whom the case has been assigned for trial, proceed no further, and that the case be reassigned (App. 15). This motion was accompanied by a timely affidavit of the petitioner and a certificate of counsel of record, as required by Section 144, *supra*. (App. 17-20).

Petitioner's affidavit recited that on May 18, 1959, at a time when his motions to dismiss the indictment, for a bill of particulars, and for production of documents were pending before the trial judge, the government prosecutor and the government's principal witness, the special agent who investigated the case, took with them certain files

and documents relating to the proof in the case, and conferred in chambers with the trial judge, without the petitioner or his counsel being present, and without notice to either of them that such a conference was being held. At this meeting with the trial judge, the quantum, nature and theory of the government's proof in this case was discussed. By reason of the statements in the affidavit concerning this meeting and the matters discussed, the petitioner expressed his belief that the trial judge must be considered to be, and is, prejudiced against the defendant and biased in favor of the government.

Hearing was held on the motion to reassign on September 8, 1959, and forthwith denied, the trial judge holding that the petitioner's affidavit was insufficient on its face (App. 24). On the same day, the case proceeded to trial.

During the course of the trial, and after the government had called some fifty witnesses, out of an estimated total of more than three hundred (App. 147), the petitioner, on September 17, 1959, moved for a continuance because of illness (App. 112), and requested an opportunity for examination by a government doctor (App. 114). Objection to this request was made by the prosecutor (App. 12). In support of this motion, petitioner, a physician, testified under oath that he was suffering from chest pains, caused by a cardiac condition, emphysema or cavitation of the lungs, and that, on the night before and on several recent prior occasions, he had lost consciousness, and feared that he might suffer a coronary infarction, with death a possibility (App. 117-119). Upon the conclusion of petitioner's testimony concerning his physical condition, the trial court, upon objection of the government, again denied his motion for a continuance to afford opportunity for examination by a government physician, without prejudice to the

right and privilege of renewal with additional evidence (App. 144-148). Subsequently, further medical testimony was offered by the petitioner concerning his physical condition (App. 159-197). One witness testified that continuation of the trial would seriously jeopardize petitioner's health (App. 188). The witness also testified that, due to the stress and strain of trial, petitioner would get into serious trouble and perhaps die, although he believed death unlikely as a mathematical or statistical matter (App. 187). The government offered no evidence touching on petitioner's physical condition.

After the offering of this evidence, petitioner moved that a juror be withdrawn and a mistrial declared, on the grounds that continuance of the trial could be fatal (App. 199). This motion was subsequently on the same day denied by the trial court (App. 206).

On September 22, 1959, petitioner moved the court for leave to withdraw his plea of not guilty and enter a plea of *nolo contendere* (App. 207). The trial court refused to entertain the proffered plea of *nolo contendere* (App. 207), whereupon petitioner moved to withdraw his plea of not guilty and enter a plea of guilty (App. 207). The trial judge, after explaining to the petitioner the nature of the charge and the probable penalties that could be imposed, and after ascertaining that petitioner had consulted with counsel, granted leave to withdraw the previously entered plea of not guilty and substitute in its stead a plea of guilty to each of the three counts in the indictment, and entered a judgment of guilty on each of these counts (App. 211). Immediately thereafter, upon being asked by the court if he cared to say anything, petitioner replied, "Well, I just can't go on with this." A pre-sentence investigation was then ordered by the court, and the case was set for

disposition on October 22, 1959 (App. 211). On the date set for disposition, petitioner was sentenced to imprisonment on each count of the indictment for a period of one year and one day, sentences on each of the counts to run concurrently, and was also sentenced to pay fines aggregating $10,000.00, together with the costs of prosecution and to stand committed until the fines were paid (App. 217). Petitioner was then remanded to the custody of the United States Marshal. A stay of execution was immediately moved for and denied (App. 217). Shortly after the imposition of sentence, and while petitioner was in the custody of the United States Marshal, he collapsed. His heart and pulse stopped, and the use of a Pulmotor was required to revive him (App. 219). Simultaneously, petitioner's counsel moved that the court suspend sentence and place petitioner on probation, or in the alternative grant a stay for such period of time as would permit a determination of petitioner's physical condition (App. 218). Immediately after this occurrence, on motion of the government prosecutor, the United States Marshal was empowered and authorized to take the petitioner to a hospital with petitioner to remain in the Marshal's custody (App. 223).

On the following morning, October 23, 1959, the petitioner through his attorney, filed a verified motion to vacate the sentence entered on October 22, 1959, and for withdrawal of his plea of guilty. The grounds for the motion may be briefly stated as:

1. That the defendant was so weakened physically that he entered the plea because he could not endure further participation in trial.

2. That the defendant was mentally disturbed.

3. That he believed he could not survive trial.

4. That the plea was entered on an irrational impulse.

5. That he entered the plea in the belief that he would not be imprisoned, and that belief was induced by remarks and statements of the trial judge and the prosecutor in off-the-record discussions; that he had been told by his attorneys that that was their judgment, based on such discussions and the evidence.

6. That the considerations in sentencing were illegal and that the sentence was motivated and imposed in response to what the trial court considered a personal affront in the filing of the earlier motion to reassign (App. 223).

The motion to vacate sentence and to withdraw the plea of guilty was denied summarily, without the taking of evidence, and without hearing on its allegations (App. 233), by order dated October 23, 1959 (App. 246). On the same day, an appeal was taken to the Court of Appeals for the Seventh Circuit.

The errors relied upon in the Court of Appeals related to the refusal of the trial judge to disqualify himself and reassign the cause, pursuant to a timely motion under Section 144 of Title 28, United States Code; that, by reason of said motion, the trial judge lost jurisdiction; that the plea of guilty was coerced by indisposition, ill-being, and was not freely and voluntarily made; that the court abused its discretion in refusing to vacate the sentence and allow withdrawal of the guilty plea or, in the alternative, in refusing to accord the defendant a hearing on his motion to withdraw the plea; and that the sentence imposed was motivated by unlawful considerations.

On June 22, 1960, the conviction was affirmed. Petition for rehearing was denied on August 1, 1960. A suggestion for rehearing *en banc* was denied on August 1, 1960. The principal grounds for the decision were that the court had jurisdiction of the subject matter and of the defendant, and had the power, upon defendant's voluntary plea of guilty, made with an understanding of the charge, to enter a judgment unassailable from attack. See Petitioner's Appendix hereto (*infra*, pp. 1a-7a).

REASONS FOR GRANTING THE WRIT.

I.

The Court of Appeals, in upholding the trial judge's refusal to recuse, upon the filing of petitioner's affidavit of bias and prejudice, has sanctioned a flagrant disregard of judicial ethics and propriety, calling for the exercise of this Court's power of supervision.

Under 28 U.S.C. 144, upon the filing of a timely and sufficient affidavit that the trial judge has a personal bias or prejudice for an adverse party or against affiant, the judge "shall proceed no further" in the case, and another judge must be assigned. Such an affidavit must "state the facts and reasons for the belief that bias or prejudice exists", and these must be sufficient to support the conclusion that bias and prejudice do exist. However, the facts stated in the affidavit must be taken as true, and cannot be controverted. *Berger* v. *United States*, 255 U.S. 22 (1921). Since they are incontrovertible, the facts stated in the affidavit are as conclusive upon the court as if they had been judicially determined to be true. Upon the filing of a timely affidavit, the only question it presents for judicial determination is whether or not its allegations, assuming them true, are sufficient to show bias or prejudice, *Berger* v. *United States*, *supra*, and thus to require the judge to disqualify himself. In the case at bar, the Court of Appeals has refused to rule on the sufficiency of the affidavit, and thus has failed to censure the clearly prejudicial misconduct of the judge alleged in the affidavit.

The affidavit now under consideration states that the trial judge was personally prejudiced against petitioner and personally biased in favor of the government, and

states in substance, as a reason for such bias and prejudice that, during the pendency before him of certain pre-trial motions in the case, the trial judge, without any notice to petitioner or his attorney of record, held a conference in his chambers with the Assistant United States Attorney assigned to try the case and the special agent of the Internal Revenue Service who was in charge of the government's investigation of this tax fraud case, and who was the principal government witness in the case, and that said special agent carried into the conference files and documents pertinent to the case, and that, at this conference between the trial judge, the Assistant United States Attorney and the special agent, matters relative to the quantum, nature and theory of the government's proof were discussed (App. 17-20).

The duty of a judge regarding *ex parte* communications of this character is epitomized in Canon 17 of the Canons of Judicial Ethics of the American Bar Association, which reads as follows:

> 17. *Ex parte* Communications.
>
> A judge should not permit private interviews, arguments, or communications designed to influence his judicial action, where interests to be affected thereby are not represented before him, except in cases where provision is made by law for *ex parte* application.
>
> While the conditions under which briefs of arguments are to be received are largely matters of local rule or practice, he should not permit the contents of such brief presented to him to be concealed from opposing counsel. Ordinarily all communications of counsel to the judge intended or calculated to influence action should be made known to opposing counsel.

The conference held by the trial judge in the case at bar is clearly repugnant to Canon 17. Such private, *ex parte* communications by the prosecutor and his chief witness, involving the nature, quantum and theory of the government's proof, could not be more clearly designed to affect judicial action. Where such a conference is held without notice to the defense, the conclusion is well-nigh irresistible that the prosecution intends it to be prejudicial; otherwise, notice, so easy to give, would be given to the accused. A trial judge who countenances such extensive *ex parte* communications and so permits himself to be exposed to one side of the case leaves himself open to the inference that he was either prejudiced *ab initio* or has become prejudiced by virtue of hearing the government's case *ex parte*.

II.

The ex parte discussion between the trial judge, the prosecutor and the government's principal prospective witness, the agent who investigated the case concerning the quantum, nature and theory of the government's proof was presumptively prejudicial, requiring disqualification of the judge to proceed further upon the filing of a timely affidavit.

In a separate opinion in *Smith* v. *United States*, 360 U.S. 1 (1959), where the record disclosed that, before the accused pleaded guilty, an F.B.I. agent called upon the trial judge in his chambers and talked at some length about the accused's background and connection with the crime charged, out of the presence of the accused or anyone representing him, three Justices of this Court were of opinion that, even though the contact was not covertly made, "In a criminal case, such a private conference must be deemed presumptively prejudicial where, in violation of Fed. Rules

Crim. Proc., 32(c) (1), it was conducted prior to the plea", and that the supervisory power of this Court required reversal. 360 U.S. at 17-18. (The majority of the Court reversed the conviction on another ground and did not reach the issue.)

A defendant, pleading guilty, "is entitled to have the judge before whom he stands . . . act in the case with complete judicial detachment, uninfluenced by conferences in chambers with agents of the prosecution." *Smith* v. *United States*, 238 F.2d 925, 931 (5 Cir., 1956), *rehearing denied*, 240 F.2d 347 (5 Cir., 1957); see also *United States* v. *Christakos*, 83 F.Supp. 521, 525 (N.D. Ala., 1949).

It is submitted that, in putting its stamp of approval on an *ex parte* conference involving so clear a violation of judicial propriety, the Court of Appeals has sanctioned a denial of the due process of law, guaranteed by the Fifth Amendment, and also a departure from the accepted and usual course of judicial proceedings, warranting the exercise of this Court's power of supervision.

III.

In holding that a judge's improper failure to recuse himself under 28 U.S.C. 144 is a mere non-jurisdictional error, the Court of Appeals has come into conflict with the decisions of courts of appeals for other circuits.

In *Connelly* v. *United States District Court*, 191 F.2d 692, 696 (9 Cir., 1951), the Ninth Circuit held that a sufficient affidavit of prejudice deprived the respondent judge of the jurisdiction to hear and determine any issue, of bail or otherwise, affecting the affiant, and granted a writ of prohibition "ordering the respondent judge to take no action in any matter affecting petitioner respecting his contentions regarding bail or in connection with his

prosecution under the above indictment . . .", 191 F.2d at 697. In *Stringer* v. *United States*, 233 F. 2d 947 (9 Cir., 1956), where a judge voluntarily disqualified himself for cause (not pursuant to 28 U.S.C. 144), his later resumption of control of the case was held incurable error, despite appellant's acquiescence in it. And in *Carroll* v. *Zerbst*, 76 F. 2d 961 (10 Cir., 1935), the Tenth Circuit, while holding that an affidavit of prejudice does not deprive the *court* of jurisdiction, says in dictum that the affidavit "merely affected the power of the judge against whom it was directed to proceed further with the case. It was directed against Judge Soper. The plea of guilty was entered before Judge Coleman . . . and he imposed the sentence." 76 F. 2d at 962. The implication is clear that if the disqualified judge had proceeded, as in the case at bar, to accept a plea of guilty and impose sentence, he would have been acting beyond his power or jurisdiction.

And in *Minnesota and Ontario Paper Co.* v. *Molyneaux*, 70 F. 2d 545 (8 Cir., 1934), the Eighth Circuit, referring to the case presented by an affidavit of prejudice directed against the trial judge in a receivership proceeding, indicated at p. 547 that it involved a question of the trial judge's jurisdiction to make orders regarding the receivership.

It would be in the public interest for this Court to resolve the conflict created by this case with the other circuits as to whether a judge's improper refusal to disqualify himself, in the face of an imperative statutory command, deprives him of jurisdiction to proceed further.

The decision of the Court of Appeals further conflicts with applicable decisions of this Court. In *Berger* v. *United States*, 255 U.S. 22 (1921), in which a trial judge erroneously refused to recuse himself, this Court ob-

served that, upon the filing of a sufficient affidavit of prejudice, it is the judge's duty to "proceed no further" in the case (255 U.S. at 35), and held that, while the judge had the right to pass on the sufficiency of the affidavit, he "had no lawful right or *power* to preside as judge on the trial of defendants upon the indictment.", 255 U.S. at 36; emphasis supplied. "Power" in this context means "jurisdiction", for "jurisdiction" is the power of a court or judge to entertain a proceeding. See 23 Words and Phrases, 361 *et seq.* and cases there cited, and *Bouvier's Law Dictionary*, Third Revision, "Jurisdiction". In *Ex parte American Steel Barrel Co.*, 230 U.S. 35 (1913), an affidavit of prejudice is referred to as "the affidavit objecting to his [the recused judge's] further exercise of jurisdiction", 230 U.S. at 43.

Where the judge is disqualified by a sufficient affidavit of prejudice, it is submitted that the court is incomplete. As in those cases where an accused is deprived of counsel, the incomplete court no longer has jurisdiction to proceed. See *Johnson* v. *Zerbst*, 304 U.S. 458, 467-468 (1938), where counsel was neither furnished nor waived. Also, in *Wm. Cramp & Sons S. & E. B. Co.* v. *International Curtiss Marine Turbine Co.*, 228 U.S. 645 (1913), in which a district judge, who had rendered a *pro forma* decree in the district court, improperly sat on the Circuit Court of Appeals and heard the case on appeal, in violation of a statutory disqualification, the court "was virtually no court at all, because not organized in conformity to law." 228 U.S. at 652. That this principle is equally applicable where a judge, on the filing of a sufficient affidavit of prejudice, refuses to recuse himself, is made clear in many state cases, as, for example, *In re Woodside-Florence Irrigation District*, 121 Mont. 346, 194 P. 2d 241 (1948), in which

the state court held that, where a sufficient affidavit of prejudice had been filed, the trial judge who proceeded to hear the case had no jurisdiction and the proceedings before him were *coram non judice* and void, notwithstanding the attempt by the affiant to waive the disqualification by withdrawing the affidavit.

IV.

Whether a plea of guilty operates as a waiver of a judge's erroneous refusal to recuse himself, upon the filing by a defendant of a timely and sufficient affidavit of prejudice, is an important question of federal criminal law.

While petitioner submits that the answer is implicit in *Berger* v. *United States*, 255 U.S. 22, 35-36 (1921), and *Ex parte American Steel Barrel Co.*, 230 U.S. 35, 43 (1913), this Court has never passed on the precise question of whether a plea of guilty operates as a waiver of a judge's erroneous refusal to recuse himself, upon the filing by the defendant of a timely and sufficient affidavit of prejudice. Especially in view of every defendant's right, even upon pleading guilty, "to have the judge before whom he stands . . . act in the case with complete judicial detachment. . . .", *Smith* v. *United States*, 238 F. 2d 925, 931 (5 Cir., 1956), *rehearing denied*, 240 F. 2d 347 (5 Cir., 1957). This is an important question of federal law, which should be settled by this Court.

In upholding a plea of guilty before, and sentence by, a judge against whom a timely and sufficient affidavit of prejudice had been filed, the Court of Appeals has sanctioned a departure by the district court from the accepted and usual course of judicial proceedings. The exigency of the statute is clear and unmistakable: The judge against whom an affidavit of prejudice is filed "shall proceed no further" in the proceeding, 28 U.S.C. 144, and in fact is without power or jurisdiction to proceed further, as is

demonstrated elsewhere in this petition. Even a defendant pleading guilty is entitled to do so before an unbiased judge, both on authority, *Smith* v. *United States*, 238 F. 2d 925, 931 (5 Cir., 1956), *rehearing denied*, 240 F. 2d 347 (5 Cir., 1957), and on reason. The proper procedure, where a timely and sufficient affidavit of prejudice has been filed and the accused decides to plead guilty, is outlined in *Carroll* v. *Zerbst*, 76 F. 2d 961, 962 (10 Cir., 1935), a *habeas corpus* case, in which it is noted that, while Carroll had filed an affidavit of prejudice against Judge Soper, he pleaded guilty before another judge, who imposed sentence. There is perhaps no time when an accused person is more in need of an unbiased judge than when he pleads guilty and becomes subject to that judge's virtually unreviewable discretion to deprive him of life or liberty. Under the practice now sanctioned by the Court of Appeals, a judge who would be disqualified by reason of bias from presiding at the trial of an accused may nevertheless accept his plea of guilty and sentence him to death or imprisonment. It is submitted that the Court of Appeals has thereby sanctioned a practice which offends the Fifth Amendment's guarantee of due process of law, and is such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

Korer v. *Hoffman*, 212 F. 2d 211 (7 Cir., 1954) concerned a petition for mandamus brought in the Court of Appeals for the Seventh Circuit, directing the same judge involved in the case at bar to disqualify himself because of his personal bias and prejudice. The Court of Appeals denied the petition, on the ground that the petitioner had an adequate remedy "to obtain redress from a reviewing court on an appeal from any final judgment which may be entered against him." 212 F. 2d at 213. The

Court equated the refusal of a trial judge to disqualify with his refusal to dismiss a complaint for failure to state a cause of action, or to dismiss an indictment for failure to charge a criminal offense, saying, at page 213, that, "In all three instances a reviewing court, upon appeal from a final adverse judgment, would be presented with a legal question and a decision in either instance favorable [sic] to the aggrieved party would require a reversal." In obedience and adherence to that decision, this petitioner did not petition the Court of Appeals for immediate and extraordinary relief, upon the denial of the motion to disqualify. Nor could he have done so! The trial judge prevented this by immediately placing the defendant on trial when he was advised of the possibility of resort to an extraordinary remedy.

One of the judges of the Court of Appeals for the Seventh Circuit, in denying petitioner's suggestion for a rehearing *en banc*, detailed the time elements involved from the time of the plea of not guilty to the time of the entry of the guilty plea, and stated, "Whether the defendant had a right to require the trial judge to disqualify is another question." The essence of the separate opinion is that petitioner waited too long for redress: that, somehow or other, petitioner should have prevented his being put on trial. These expressions are irreconcilable with the same court's decision in *Korer* v. *Hoffman*, 212 F. 2d 211 (7 Cir., 1954), discussed above. See also *Goldberg* v. *Hoffman*, 226 F. 2d 681 (7 Cir., 1955). It appears that petitioner is being penalized for doing what, under the existing law of the circuit, he was obliged to do.

This, too, is a proper circumstance for exercise of the supervisory jurisdiction of this Court over inferior courts.

V.

The Court of Appeals' characterization of petitioner's plea as being voluntary is not supported by the record, and calls for the exercise of the power of supervision of this Court.

It was clearly demonstrated during the trial that petitioner was physically unable to continue with the trial and fearful that continuing would be fatal to him (App. 118-119). The testimony of petitioner, a physician, under oath, concerning his physical condition, was bolstered by another physician, a specialist in internal medicine, who expressed the opinion that continuance of the trial could cause petitioner's death, although statistically unlikely (App. 187), but would severely jeopardize his health (App. 188). Despite the failure of the government to offer any testimony to refute the evidence, and the objection of government counsel to having petitioner examined by government doctors, the trial judge denied petitioner's motion for a mistrial. The denial of this motion confronted petitioner with a fearful dilemma, and left him with the alternatives of either risking his health, and even his life, to establish his innocence, or bringing his ordeal to an end by a plea of guilty. That the latter alternative prompted his plea of guilty is evidenced by his statement to the court, made contemporaneously with his plea, "*Well, I just can't go on with this.*" (App. 211).

It is earnestly urged that petitioner's plea of guilty was not voluntary, and the trial judge's acceptance of the plea under these circumstances violated the clear mandate of Rule 11 of the Federal Rules of Criminal Procedure.

The fact that the trial judge explained the nature of the charge to petitioner, ascertained that he had consulted with his lawyer, advised him of the possible penalties that might be imposed, ascertained that no one connected with

the government or any of his lawyers had assured him that any special form or kind of punishment would be interposed (App. 208-211), completely failed to establish that the plea was voluntary. On the contrary, all of the circumstances concerning this question clearly establish that petitioner's plea of guilty was coerced by reason of illness, and his fear that going forward with the trial would jeopardize his health and life.

In *Waley* v. *Johnson*, 316 U.S. 101, 104 (1942), this Court enunciated the principle that a plea of guilty coerced by a federal law enforcement officer was no more consistent with due process than a conviction supported by a coerced confession. It is submitted that this ruling is equally applicable to a plea coerced by fear of death.

A coerced plea of guilty would be clearly subject to collateral attack. *Waley* v. *Johnson*, 316 U.S. 101, 104 (1942). *A fortiori*, it is therefore available on direct appeal.

VI.

In light of the events which occurred during the trial and the sworn allegation of counsel in the petitioner's motion to withdraw his plea of guilty, the trial court's denial of this motion without hearing was an abuse of judicial discretion.

Rule 32(d) of the Federal Rules of Criminal Procedure provides that, to correct manifest injustice, the court, after sentence, may set aside the conviction and permit the defendant to withdraw his plea. The granting of an application to withdraw a plea of guilty after sentence is discretionary with the court. An order denying the application, however, is reviewable on appeal for abuse of discretion. *United States* v. *Mack*, 249 F. 2d 421, 423 (7 Cir., 1957). Under the circumstances of this case, it

is submitted that the trial judge's summary denial of petitioner's motion to withdraw his plea of guilty constituted a clear abuse of discretion. This Court has held that, on timely application, the trial court should vacate a plea of guilty shown to have been unfairly obtained, or given through ignorance, *fear* or inadvertence. *Kercheval* v. *United States*, 274 U.S. 220, 224 (1927). See also *United States* v. *Lias*, 173 F. 2d 685, 688-689 (4 Cir., 1949).

Petitioner alleged in his motion, sworn to by counsel, to vacate sentence and for withdrawal of plea of guilty, that his decision to enter the plea of guilty was induced by fear of death and made upon an irrational impulse caused by mental disturbance and physical fear, and was also induced by remarks and statements of the trial judge and the prosecutor, in chambers, during off-the-record discussions during the trial, as related by his counsel, which impelled the belief that he would not receive a sentence of imprisonment, if he would agree to enter a plea of guilty, and that this was the opinion of his counsel, based on the events, conversations and the evidence.

Certainly, a hearing on these allegations was required. *Norman* v. *United States*, 276 F. 2d 377 (9 Cir., 1960). None was accorded. In this regard, the affirmance of the order of the district court, denying the motion without hearing, must be interpreted as a holding that, assuming the truth of the allegations, it was not sufficient in law to merit granting the relief asked. In this, the decision of the Court of Appeals for the Seventh Circuit is in direct conflict with the decision of the Fourth Circuit in *United States* v. *Lias*, 173 F. 2d 685 (4 Cir., 1949), holding that a defendant should properly be allowed to withdraw his guilty plea if, as a result of what the judge has said;

the defendant was misled into pleading guilty, under the belief he would receive probation.

Conviction upon a coerced plea of guilty, and the imposition of sentence thereon, constituted a denial of the due process of law guaranteed by the Fifth Amendment. *Euziere* v. *United States*, 249 F. 2d 293, 294-295 (10 Cir., 1957). The trial court's summary denial, *without hearing*, of the motion to vacate sentence and permit withdrawal of the plea of guilty constituted a manifest abuse of discretion, and a departure from the accepted and usual course of judicial proceedings, calling for the exercise of this Court's power of supervision.

On the subject of whether or not a hearing is *required* on the claim of petitioner that physical weakness, mental disturbance, irrationality, and the fear that continuing with the trial would cause his death, caused him to enter a plea of guilty, the conflict exists between this case and the decision of this Court in *Dandridge* v. *United States*, 356 U.S. 259 (1958) and *Dusky* v. *United States*, 362 U.S. 402 (1960); the opinion of the Ninth Circuit in *Norman* v. *United States*, 276 F. 2d 377 (9 Cir., 1960), and the opinion of the Court of Appeals for the District of Columbia in *Gearhart* v. *United States*, 272 F. 2d 439 (D.C. Cir., 1959).

The situation here is closely related to the circumstances before this Court in *Dandridge* v. *United States*, *supra*, where the defendant claimed he was in such pain that he pleaded guilty. The decision here is in direct conflict with this Court's holding in that case. It is also in direct conflict with the holding of this Court in *Dusky* v. *United States*, *supra*, the holding of the Court of Appeals for the District of Columbia in *Gearhart* v. *United States*, *supra*, and the holding of the Ninth Circuit in *Norman* v. *United States*, *supra*, that the trial courts in-

volved did not have a sufficient basis on which to make a ruling of competency to stand trial, and that the holding against the respective defendants was not justified by the record.

CONCLUSION.

The decision below is erroneous, and out of harmony with rulings of this Court and other courts of appeals. It sanctions departures from the usual and accepted course of judicial procedure which are sufficient to warrant the exercise of this Court's power of supervision over the administration of justice in the federal courts. The writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel.

PETITIONER'S APPENDIX.

In The

UNITED STATES COURT OF APPEALS.

For The Seventh Circuit.

SEPTEMBER TERM, 1959—APRIL SESSION, 1960.

No. 12811

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
ROBERT C. HETHERINGTON,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 22, 1960.

Before HASTINGS, *Chief Judge*, KNOCH and CASTLE, *Circuit Judges.*

CASTLE, *Circuit Judge.* The defendant Robert C. Hetherington was indicted on March 12, 1959 for attempted evasion of his individual income taxes for the calendar years 1952, 1953 and 1954, in violation of Section 145 (b) of the Internal Revenue Code of 1939 and Section 7201 of the Internal Revenue Code of 1954.

On April 3, 1959 defendant entered a plea of not guilty and was given until May 4, 1959 to file motions. Motions were made to dismiss the indictment, for discovery and production, and a bill of particulars, all of which were disposed of on June 17, 1959. The defendant made a timely motion accompanied by an affidavit pursuant to Section

144 of Title 28, United States Code, that Julius J. Hoffman, the judge to whom the trial was assigned, proceed no further, and that the cause be reassigned. The principal recitation of the affidavit stated that during the pendency of certain motions on May 18, 1959, the prosecutor and the Government's principal witness had a conference in Judge Hoffman's chambers at which time the theory of the Government's case was discussed. The affidavit further stated that the defendant was not present, nor given any notice that this meeting was to occur. On the basis of this affidavit the defendant expressed his belief that the Judge must be considered to be personally biased in favor of the plaintiff, the United States of America.

After motions made by defendant's counsel had been disposed of the case was set for trial on September 8, 1959 before the Honorable Julius J. Hoffman. Trial was commenced on September 8, 1959 and the Government proceeded with presenting its evidence until September 22, 1959, at which time the defendant moved to withdraw his plea of not guilty and enter a plea of guilty. Said motion was granted and the defendant entered his plea of guilty, and on October 22, 1959 the trial judge sentenced the defendant to one year and a day and a fine of $10,000.00 was imposed.

On October 23, 1959 defendant filed a motion to vacate the sentence and for withdrawal of his plea of guilty, which was denied.

The contested issues are:

1. Whether a plea of guilty was voluntarily entered by the defendant after consulting with, and upon the advice of counsel.

2. Whether this is the proper forum and time for review of the lower court's failure to reassign.

3. Whether a sufficient showing was made to empower the trial court to entertain a motion to withdraw the plea of guilty made by defense counsel after sentence was imposed.

4. Whether the ruling of the trial court upon the motion for continuance and for the withdrawal of a juror raises jurisdictional questions not waived by the entry of a guilty plea.

5. Whether the sentence imposed was legal and within the discretion of the trial court.

The defendant Robert C. Hetherington was a practicing physician and surgeon in Geneva, Illinois. On March 12, 1959 he was indicted. The indictment was in three counts, alleging that the joint returns filed by he and his wife, Leola, were false and fraudulent, in that the said defendant did thereby attempt to defeat and evade a large part of the income tax due to the United States of America. The years involved were 1952, 1953 and 1954. The total evasion charged for the three years was $14,820.48 on a total additional income of $38,853.62. The Government intended to prove its case on the "net worth" theory.

On September 8, 1959 the motion for reassignment was heard and denied by the court who expressed the opinion that the supporting affidavit was insufficient to justify the granting thereof. Defendant's counsel then asked for a continuance stating that he had not had sufficient time to prepare the case for trial. This motion was denied and the case proceeded to trial.

After selection of the jury and making opening statements on behalf of the Government and the defendant, the Government on September 10, 1959 began the introduction of evidence and the case continued on trial daily until September 22, 1959 when the defendant moved to withdraw his plea of not guilty and enter a plea of guilty. On September 14, 1959 at the request of the Government a conference was had in chambers to discuss problems created by the necessity of subpoenaing numerous witnesses for the production of documents. The court was informed by defendant's counsel that he would have to hold the Government to the rule requiring strict proof. At the same conference Mr. Calihan, defendant's counsel, ad-

vised the court that he had a genuine fear that the defendant would destroy himself, and also requested that the court adjourn at 4:45 P.M. each day in order that the defendant might get back to Geneva and carry on his practice in the evening. Judge Hoffman indicated that he would not relieve the Government of its difficulties arising from the nature of the case and the volume of its exhibits and witnesses, and in this conference he further advised counsel he would try to accede to his request regarding adjournments. On September 15, 1959, the trial was again interrupted by a conference in the chambers and Mr. Calihan acknowledged that the Government's counsel had consulted with the Department of Justice and that the Government would not make a recommendation to the trial court with reference to the type of disposition which might be made upon a plea of guilty. Mr. Calihan then attempted to obtain a commitment from Judge Hoffman as to what the sentence might be and it is very clear from Judge Hoffman's remarks that he would not make any arrangements in advance with the defendant as to what the sentence might be. The court went into great detail telling counsel for defendant that he would not make any deal as to what the sentence might be.

On September 17 certain representations were made that the defendant had fallen the previous evening injuring his leg. There were other medical representations made, one of which was a report from Mayo Clinic, but that opinion indicated that the doctor was in shape to proceed to trial and advise with his counsel.

Again on September 17 at the conclusion of the morning session the defense counsel raised the question of the defendant's health. Judge Hoffman then advised defense counsel as follows:

> "I will be glad to give you a hearing outside of the presence of the jury with respect to the alleged or asserted medical condition of the defendant at any time you move for it."

During the afternoon session of September 17 the defendant took the stand in his own behalf to support his contention as to his physical condition and outlined his medical history. At the conclusion of the defendant's testimony the court denied defendant's motion for a continuance to permit a physical examination of the defendant by a Government doctor.

Again on September 21 the case was interrupted to permit the defendant to offer further evidence in support of his physical condition. Dr. Rodney Nelson and Dr. Thomas A. Heenahan were called as witnesses for the defense. Dr. Nelson stated that it was his opinion that it was unlikely that the defendant would become seriously ill or die because of the stress and strain of the trial, but that the continuation of the trial would seriously jeopardize the health of the defendant. Dr. Heenahan stated that he had no opinion as to the effect of the trial on the health of the defendant. At the conclusion of the testimony of Dr. Heenahan the defendant moved to withdraw a juror and to declare a mistrial. This motion was denied.

Then on September 22, 1959 the defendant asked to withdraw his plea of not guilty and to enter a plea of nolo contendere which was denied. Then the defendant moved for leave to withdraw his plea of not guilty and to enter a plea of guilty and the Court explained to the defendant in the presence of his attorney the charges in the indictment, and the defendant was asked if he knew the nature of the charges. The defendant answered "Yes, Sir." The Court then explained the possible penalty upon the plea of guilty and the defendant said he understood the consequence of such a plea.

On October 22, 1959 the case came on for disposition on the plea of guilty. The defendant was given a chance to say whatever he desired in his own behalf. The Court after having studied the pre-sentence report, and hearing the defendant, sentenced him to one year and one day in the penitentiary and assessed a fine of $10,000.00.

On October 23, 1959 the defense counsel filed a motion to vacate the sentence and for withdrawal of the plea of guilty. The trial court heard at length the arguments of counsel for the defendant; and at the conclusion of the arguments denied the motion.

There is considerable evidence in the record as to the defendant's physical condition during the trial and at the time of the defendant's plea of guilty, however, we are of the opinion that it is clear that the defendant voluntarily entered his plea of guilty with full understanding of the nature of the charges made in the indictment, his available defenses and the nature and consequences of such plea. The record shows that the defendant was represented by able counsel. The record further discloses that he was admonished at great length as to the consequencets of a plea of guilty. The plea of not guilty was not withdrawn and a plea of guilty entered until the case had been on trial for two weeks, and not until defendant's counsel had exhausted many possible avenues for change of venue, a continuance, or a commitment by the court as to a sentence the defendant might receive. We are of the opinion there is no merit to the contention that the defendant was coerced or did not know the consequences of his plea of guilty.

The court having jurisdiction of the subject matter and of the defendant had the power upon defendant's voluntary plea of guilty made with an understanding of the nature of the charge to enter a judgment unassailable from attack. A plea of guilty admits all essential allegations, thus relieving the Government of the burden of making proof and a court having jurisdiction of the subject matter and of the defendant has power to enter a judgment, unassailable by collateral attack, on a guilty plea without conducting an independent inquiry or hearing to determine so-called jurisdictional facts. *United States* v. *Hoyland*, 264 F. 2d 342, 352. It is our opinion that a voluntary plea of guilty constitutes an effective and complete waiver of all non-jurisdictional defects which

might be otherwise raised by way of defense, appeal or collateral attack. *Weir* v. *United States*: 92 F. 2d 634, 635.

It has been held many times that an Assistant United States Attorney may confer with the Trial Judge even though it is out of the presence of the defendant without grounding an inference of improper scheming against the right of defendant to a fair and impartial trial. *Craven* v. *United States* (C.C.A. 1), 22 F. 2d 605, 606, 607. In any event the trial court's denial of the motion to reassign the case does not, even if erroneous, raise a jurisdictional question.

The proposition that a sentence within the statutory maximum provided for by Congress is not subject to review on appeal except possibly for manifest abuse of discretion is well established. In the instant case the sentence although possibly unexpected by the defendant was not beyond the maximum limitations provided in applicable statutes.

Therefore we hold that the sentence imposed was legal and within the discretion of the District Court. It did not err in refusing to vacate the sentence or permit withdrawal of the plea.

Judgment affirmed.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

Chicago 10, Illinois

Wednesday, June 22, 1960

Before

Hon. John S. Hastings, Chief Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Latham Castle, Circuit Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. ROBERT C. HETHERINGTON, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 12811

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

No. 12811

SCHNACKENBERG, *Circuit Judge*.

Defendant seeks a rehearing in this court and suggests that the rehearing be held *en banc*.

Among the grounds urged for a rehearing is defendant's assertion that this court has not decided whether defendant's affidavit of bias was sufficient to require the district judge's disqualification.

The record shows the following relevant facts:

1959

April 3 Plea of not guilty entered.

May 18 Alleged conference held in trial judge's chambers, without notice to defendant or his attorney of record, where assistant United States attorney assigned to trial of defendant's case, and special agent Ralph A. Weber conferred with trial judge; that said Weber had conferences with defendant therefore and was to be the principal witness against him; at said conference matters relating to the quantum, nature and theory of the government's proof in this cause were discussed; that trial judge has evidenced a personal bias and prejudice against defendant.

June 17 Order setting case for trial Sept. 8, 1959.

August 25 Affidavit of defendant in support of his motion that trial judge reassign case, pursuant to 28 U.S.C.A. § 144, supported by affidavit of defendant setting forth, *inter alia*, facts set forth, *supra*, alleged to have occurred on May 18, 1959.

September 8 Order denying defendant's motion to reassign case, etc. Trial started.

" 22 By leave of court defendant withdrew plea of not guilty, and, upon arraignment, pleaded guilty on counts 1, 2 and 3. Judgment of guilty entered.

We have no situation which suggests that the court was without jurisdiction in these proceedings. Whether the defendant had a right to require the trial judge to disqualify himself is another question. In his brief in this court his counsel contends, erroneously, I think, that this court has not ruled on whether his affidavit of bias was sufficient to require the court's disqualification. It is not necessary for me to consider what position I would have taken as to this affidavit if I had been a member of the panel which decided this case. I am limited to voting upon the suggestion of a rehearing *en banc*. For that purpose I have examined the affidavit with great care. Unfortunately for defendant, whose affidavit it is, I note a significant omission in the recital of facts. The affidavit fails to show when he first learned of the conference in chambers which he relies upon as the basis for his motion to transfer from the trial judge. However the affidavit, which was made on August 25, 1959, reveals that at or before that date he had knowledge of the facts charged therein. It follows, therefore, that he knew these facts on September 8, 1959 when his motion to transfer the case was denied and the trial started. It was not until September 22 that he interrupted the trial by withdrawing his plea of not guilty and pleaded guilty whereupon the judgment appealed from was entered.

It is apparent that with knowledge of the alleged facts he withheld action until the evidence at the trial developed unfavorably to him. If the court erred in denying his motion for transfer of the case, he waived that error by entering a plea of guilty, and he is now in no position to complain of the court's action in that respect.

I have therefore voted to deny his suggestion for a rehearing *en banc*.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago 10, Illinois

Monday, August 1, 1966

Before

Hon. John S. Hastings, Chief Judge
Hon. F. Ryan Duffy, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Latham Castle, Circuit Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee,	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 12811 vs.	
ROBERT C. HETHERINGTON, Defendant-Appellant.	

It Is Ordered by the Court that the petition for a rehearing *en banc* of this cause be, and the same is hereby, DENIED.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago 10, Illinois

Monday, August 1, 1960

Before

Hon. John S. Hastings, Chief Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Latham Castle, Circuit Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee,		Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 12811	vs.	
ROBERT C. HETHERINGTON, Defendant-Appellant.		

It is ordered that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

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No. 369

In the Supreme Court of the United States

OCTOBER TERM, 1960

ROBERT C. HETHERINGTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 369

ROBERT C. HETHERINGTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 1a–7a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1960 (Pet. 8a), and a petition for rehearing was denied on August 1, 1960 (Pet. 10a). The petition for a writ of certiorari was filed on August 30, 1960. The jurisdiction of this Court in invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an affidavit alleging that three months earlier the trial judge and prosecutor had conferred,

ex parte, about unspecified matters relating to the case is, without more, sufficient to establish that the judge has a "personal bias or prejudice" against the defendant and therefore to require the judge to recuse himself under 28 U.S.C. 144.

2. Whether the affidavit was timely filed under 28 U.S.C. 144, where no good cause was shown for failing to file it during the term of court at which the case was originally set for trial and at which pretrial motions were heard.

3. Whether petitioner's subsequent plea of guilty moots the error, if any, in the judge's refusal to recuse himself because of the *ex parte* conference.

4. Whether the district court erred in accepting as voluntary a plea of guilty entered after two weeks of trial with full advice and acquiescence of counsel.

5. Whether a plea of guilty may be withdrawn after sentencing on grounds of which the defendant and his counsel admittedly had full knowledge, but did not raise, prior to sentencing.

STATUTE AND RULE INVOLVED

28 U.S.C. 144:

> *Sec. 144. Bias or prejudice of judge*
>
> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Federal Rules of Criminal Procedure:

> *Rule 32. Sentence and judgment*
>
> * * * * *
>
> (d) *Withdrawal of Plea of Guilty.* A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.
>
> * * * * *

STATEMENT

Petitioner was indicted in the United States District Court for the Northern District of Illinois, Eastern Division, on three counts of willful evasion of income taxes by filing fraudulent returns for the three years 1952–1954, in violation of §§ 145(b) and 7201, respectively, of the Internal Revenue Codes of 1939 and 1954 (R. 10–12). After two weeks of trial before a jury, petitioner withdrew his plea of not guilty and pleaded guilty (R. 208–210). He was

sentenced to concurrent prison terms of a year and a day on each count and fined a total of $10,000 (R. 217). A motion to vacate the sentence and withdraw the guilty plea was denied (R. 233), and the judgment was affirmed by the court of appeals (Pet. 1a–7a). The facts relevant to petitioner's contentions are as follows:

1. Petitioner was indicted on March 12, 1959, and the case, assigned to Judge Julius J. Hoffman, was originally set for hearing on pretrial motions on May 8, 1959, and for trial on May 18, 1959. The hearing and trial dates were thereafter continued from day to day until June 17, 1959, when the court ruled on the pretrial motions (for dismissal, a bill of particulars, and production) and continued the case for trial until the opening day of the following term, September 8, 1959 (R. 1–3, 15).

On August 27, 1959, petitioner filed a motion under 28 U.S.C. 144, *supra*, to require Judge Hoffman to recuse himself for "personal bias and prejudice" and reassign the case to another judge (R. 3, 16). The supporting affidavit (R. 17–20) alleged that on May 18, 1959, without notice to petitioner, Judge Hoffman conferred in chambers with the Assistant United States Attorney and Ralph A. Weber, the Internal Revenue Service agent in charge of the investigation of the case (R. 18); that Agent Weber had with him files and documents relating to the case (R. 18); and that "things and matters relating to the quantum, nature and theory of the Government's proof in this cause were discussed" (R. 18–19). The claim of bias appears in paragraph 9 of the affidavit, which alleges that in other criminal cases tried before him Judge

Hoffman "has exhibited a personal bias for the Government and against the defendant"—citing as an example a recent reversal by the court of appeals—and that, "by the conduct of a conference in chambers" with the prosecutor, Judge Hoffman "has evidenced a personal bias and prejudice against [petitioner], and a personal bias and prejudice in favor of the Government in this cause" (R. 19). The motion was denied on September 8, 1959, and the case proceeded to trial (R. 21, 24).

2. On September 17, petitioner moved for a continuance (R. 112–114, 143–148), later clarified as motion for a mistrial (R. 198–200), on the ground that he was physically unable to continue trial, and the trial was recessed for a hearing on the motion. A report of an examination made by the Mayo Clinic on August 27–31, 1959, less than two weeks before the trial, was offered in evidence (R. 244–245; 119, 145) and petitioner (a practicing doctor) himself testified on his condition (R. 116–143). The motion was denied on the evidence then offered, but without prejudice to a further offer of evidence (R. 148). On September 21, after an intervening day of trial, the motion was renewed and two doctors who had previously been consulted by petitioner testified in his behalf (R. 159–188 (Nelson); 189–197 (Heenahan)). The evidence offered at the two hearings may be summarized as follows:

Petitioner had for about five years had arteriosclerotic cardiovascular disease with angina pectoris symptoms (R. 163), a common heart disease (R. 184)

the progress of which in his case could be classified as "mild" (R. 194–195).[1] Electrocardiograms taken over several years had been about half normal and half abnormal (R. 163), and the most recent one, made during the course of the trial and only a few days before the motion, was normal (R. 166, 169). The report from the Mayo Clinic stated that an electrocardiogram "was within normal limits" and concluded that, "from the standpoint of his cardiac disease and general physical condition", petitioner "was getting along satisfactorily" (R. 245). Petitioner had never been hospitalized for his condition (R. 139) and continued to practice medicine on evenings and weekends during the course of the trial (R. 131).

The evidence going to the probable effect of the emotional strain of the trial on petitioner's condition requires more detailed statement. Petitioner testified that he had had chest pains for five years but they had become worse during the trial and that (R. 119):

> * * * I have tried to come along with this, but I fear if it continues, it can happen to anybody including myself, and a possible coronary infarction with death is certainly a possibility and something I have looked forward to for some time.'

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[1] There was also evidence that petitioner had recently developed emphysema of the lungs (R. 118, 190), but that condition, unrelated to the heart disease, was not relied upon as a basis for the motion. Petitioner also testified to having had four dizzy spells during recent months (R. 117–118), but his attending physician had no opinion as to their cause (R. 167).

He also testified that his life would be "in danger" if the trial were to continue (R. 132). When asked about the relationship of emotional strain or tension to the progress of the disease, he replied that "I can't say" whether they were related and stated that "it is a disease of old age and is a gradually progressive thing" (R. 123). He also testified that participation in the trial had not "disturbed me mentally too much" (R. 138).

Dr. Nelson, petitioner's consulting physician, testified that an "armchair existence" was no longer prescribed for coronary patients (R. 164–165) but that he had advised petitioner to avoid "excesses" of "emotional strain" or of any other sort (R. 168). Asked whether the stress of a protracted trial might "seriously endanger the doctor's life," he replied, "I think you could say it could" (R. 164). Later, when asked the effect of a trial on petitioner's condition, he restated his diagnosis of the disease and said that "beyond that point you deal with statistics" (R. 167–168). Pressed for a personal opinion, he stated that "I believe severe emotional strain can jeopardize anybody's life with this disorder" (R. 169). After a question whether, in light of the more recent electrocardiographs with normal results, petitioner's condition was improving or worsening, the following colloquy occurred (R. 183):

> The WITNESS. I would say there is electrocardiographic improvement. The patient may be dead the next day.

The COURT. That could happen to you and to me too, couldn't it?

The WITNESS. Certainly.

Having replied, "He might," to a question whether petitioner might die suddenly during the course of the trial because of his condition (R. 185), the witness was asked for his judgment of the probabilities based on his personal examination of petitioner, and the following exchange took place (R. 187):

The WITNESS. I think this man could get into serious trouble, perhaps die, due to stress and strain of this trial. I think it is unlikely.

The COURT. You think it is unlikely?

The WITNESS. We are speaking about individual again, and I have to speak statistically.

The COURT. Based on your statistical knowledge, of course, and your clinical experience. But you think it unlikely, is that it? Is that your answer?

The WITNESS. Yes, but could I add that if there is one chance in one hundred that a life is jeopardized, as a medical man—

The COURT. We will leave that to the lawyers, that one chance in a hundred. I don't know about that.

* * * * *

Q. Doctor, when you say it is unlikely, do you mean you are now talking mathematically?—A. Mathematically.

Q. But the danger is there?—A. Yes, sir.

* * * * *

Q. Doctor, may I ask you, do you have an opinion as to whether or not the continuation of this trial will or will not have an adverse

effect on the physical health of Dr. Hetherington? Do you have an opinion at this time as you sit here on the witness stand?—A. The best word I can think of is that it would jeopardize his health.

* * * * *

Q. And in what manner and to what extent would it jeopardize his health, in your opinion?—A. The range would be from mild to death. I am unable to predict.

Q. I am not asking for the possible ranges, but what is your opinion? Will it or will it not seriously jeopardize his health in your opinion?—A. I would say it will seriously jeopardize his health.

The final witness, Dr. Heenahan, a radiologist who had made chest roentgenograms of petitioner, confirmed the diagnosis of arteriosclerosis of the heart but refused to express an opinion as to the effect of the trial on petitioner's condition (R. 197). However, asked whether "worry, stress or strain have any short term effect," he replied: "I don't see as we can establish that particular fact. I mean, that would be purely speculation." (R. 195). He acknowledged that arteriosclerosis is a gradual progressive disease and stated that the rate of acceleration or what causes acceleration "is strictly unknown to us" (R. 195).

After hearing the evidence offered at both hearings, the district court denied the motion for a mistrial (R. 206).

3. On September 22, 1959, on the morning following the denial of the motion for a mistrial, petitioner

moved, through counsel, for leave to withdraw his plea of not guilty and enter a plea of guilty (R. 207). Addressing petitioner, the court explained in detail the nature of the charges and the punishment that could be imposed and, when petitioner replied that he understood the charges and still desired to plead guilty, accepted the plea (R. 207–210). The court immediately went on to question petitioner at length whether any representations or assurances had been made to him by anyone regarding the form or kind of punishment that would be imposed, explaining that if any such representations had been made he would not permit him to plead guilty (R. 210–211). After Government counsel stated, in response to an inquiry, that petitioner had no criminal record, had practiced medicine for thirty years, and was well regarded in the community, the court asked defense counsel and petitioner, in turn, whether they had anything to say. Defense counsel replied that "the defendant stands before you and throws himself on the mercy of the court", and petitioner stated: "Well, I just can't go on with this" (R. 211). The court then ordered a pre-sentence investigation, set the case for sentencing on October 22, and discharged the jury (R. 211–212).

4. On October 22, 1959, at the sentencing hearing, petitioner, given an opportunity to make a statement, stated (R. 7, 213):

> I don't know what I could say except that I am sorry the whole mess occurred. It is probably because of my boy, and I have been upset, and I haven't been careful of my records.

After argument by counsel on the report of the presentencing investigation (R. 213–217), the court imposed a sentence of imprisonment for a year and a day and fines totalling $10,000 (R. 217). The district court denied a stay of execution (R. 217–218), later explaining that he did so because defense counsel had on a number of occasions during the trial represented to him that petitioner had threatened to take his own life (R. 228), and petitioner was remanded to the custody of the marshal (R. 217).

Within minutes of the sentencing, and almost immediately upon his delivery to the marshal, petitioner collapsed (R. 219). The court, on motion, authorized his immediate removal to a hospital (R. 218–223). It was initially reported that the collapse was caused by a heart attack (R. 219), but by the following day it had been learned that that was not the reason.[2] Because of defense counsel's objection that disclosure of the true reason for the collapse would be "slander-

[2] On the morning following the collapse, when defense counsel moved to vacate the sentence, Government counsel attempted to introduce a report from the marshal of a diagnosis given him by the attending physician (R. 231–232). It was made evident that the purpose of the offer was to correct the misimpression of the previous day that petitioner had had a heart attack. Defense counsel objected to the report, however, on the ground that "if it is what I am thinking of, you are bordering on a slanderous remark" (R. 232), and it was never admitted into evidence. While inferences as to possible "slanderous" causes of the collapse can be drawn from the record (see, *e.g.*, R. 228), the only thing important here is that, as the record clearly indicates (from the offer of proof and the grounds of the objection), the collapse was not caused by a heart attack, and thus provides no support for petitioner's claims that his heart condition made him unable to stand trial.

ous" (R. 232), however, the actual cause of the collapse is not disclosed by the record.

5. On the morning following the sentencing, while petitioner was still in critical condition at the hospital (R. 240), defense counsel filed on his behalf a motion to vacate the sentence and to permit withdrawal of the plea of guilty (R. 237–242). The motion was signed by counsel but purported to be based upon communications made to him, at some unspecified time, by petitioner (R. 243). It alleged, in substance, that petitioner had been so physically weakened that he could not endure further trial, that he had been mentally disturbed and believed he could not survive the trial, and that he had pleaded guilty on an "irrational impulse" (R. 237–238). It was also alleged that petitioner had been misled into believing that he would not be sentenced to imprisonment if he pleaded guilty (R. 238–239). The court, after argument (R. 229–233), denied the motion (R. 233).[3]

ARGUMENT

The petition in this case contains numerous innuendos, if not direct allegations, of impropriety and unfairness on the part both of Government counsel and the district judge. While none of petitioner's contentions seems to us of substantial merit, we have considered it appropriate because of their nature to

[3] The court in effect dismissed, on the basis of its prior ruling, a part of the motion (R. 240–242) which sought to reassert the motion for disqualification under 28 U.S.C. 144 (R. 233).

answer them in greater detail than is customary in a brief in opposition.

1. In objecting to the *ex parte* conference had between the trial judge, Government counsel, and the revenue agent, petitioner assumes that if the conference was improper it automatically provided a basis for disqualification of the judge under 28 U.S.C. 144. But the peremptory challenge procedure of § 144 is available only for "personal bias or prejudice", and "personal bias" is not synonymous with error or impropriety. We show below that petitioner has not established even error or impropriety. Our first point, however, is that, whether or not it was "error", the holding of the conference in no way establishes a personal bias or prejudice on the part of the judge for which the extraordinary procedures of § 144 may be invoked.

The affidavit filed by petitioner suggests two quite different inferences of bias or prejudice—namely, (1) that the judge had a pre-existing bias which was "evidenced" by his action in holding the conference, and (2) that the judge became prejudiced as a result of the conference. Neither of those assertions, however, is sufficient on its face to show the kind of *personal* bias or prejudice which the courts have emphasized is the sole province of § 144.[a]

a. The affidavit alleges that "Judge Julius J. Hoffman in other criminal cases tried in his courtroom has

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[a] *Henry* v. *Speer*, 201 Fed. 869, 871 (C.A. 5), cited with approval in *Berger* v. *United States*, 255 U.S. 22, 32; *Price* v. *Johnston*, 125 F. 2d 806, 811-812 (C.A. 9); *Mitchell* v. *United States*, 126 F. 2d 550, 552 (C.A. 10).

exhibited a personal bias for the Government and against the defendant" and that that pre-formed "bias" against defendants—and, ergo, petitioner—was "evidenced" by his action in holding the *ex parte* conference (R. 19). That allegation is, in substance, no more than an assertion that Judge Hoffman has a reputation as a "hard" judge in criminal cases. While it may explain why petitioner wanted to disqualify Judge Hoffman, it plainly does not satisfy the requirements of § 144. It goes to the judge's general attitude or philosophy towards a class of cases, not to his relationship to the particular defendant in this case, and thus is wholly insufficient to establish "personal bias or prejudice".

b. The affidavit was apparently also intended to suggest, though it is nowhere stated, that Judge Hoffman became prejudiced as a result of the conference—presumably on the theory that he may have been exposed to evidence on one side of the case and may as a consequence have formed a prejudgment on the merits of the case. We may question, in the first place, whether § 144 is ever an appropriate vehicle to raise alleged errors or improprieties committed in the course of the judicial proceedings themselves. The statute seems designed primarily to permit challenges for reasons extrinsic to the proceedings (*e.g.*, personal feelings and relationships), and there seems no reason to invoke that extraordinary procedure—the essence of which is the uncontrovertible nature of the affidavit—to complain of alleged errors committed in the course of the proceedings themselves and subject to correction by ordinary

judicial procedures. Even if the procedure is otherwise available, however, it is still necessary that the action complained of reflect personal bias and prejudice and not mere error, and that requirement remains unsatisfied here.

The bare fact that a judge and a prosecutor have conferred does not, by itself, give rise to an "inference of improper scheming against the right of the defendant to a fair and impartial trial." *Craven* v. *United States*, 22 F. 2d 605, 607 (C.A. 1). Cf. *United States* v. *Onan*, 190 F. 2d 1, [illegible] (C.A. 8); *United States* v. *Volpati*, 120 F. Supp. 80, 87 (D.N.J.). To the fact of the conference, the affidavit here adds only the allegation that "matters relating to the quantum, nature and theory of the Government's proof in this cause were discussed" (R. 18-19). That, however, is fully as consistent with a proper conference as with an improper one. It would, for example, be an accurate description of a conference in which Government counsel asked when the judge expected to bring the case to trial and, in response to an inquiry as to the anticipated length of the trial, explained that it was a "net worth" case (theory of proof) in which numerous stock transactions would have to be traced (nature) and a large number of transfer agents called as witnesses to authenticate their records (quantum). Plainly, such a conference would not even be prejudicial to the defendant, much less produce in the judge a personal bias or prejudice against him. There being nothing in the affidavit, accepted at full value, tending to show personal bias and prej-

udice, the affidavit was insufficient on its face and the motion under § 144 was properly denied.[5]

c. It may be noted, finally, that the affidavit of bias and prejudice was not filed within the time required by § 144—namely, "not less than ten days before the beginning of the term at which the proceeding is to be heard" unless "good cause" is shown for a later filing. The case was originally set for hearing on motions on May 8, 1959, and for trial on May 18, 1959. After numerous continuances, the motions were argued and decided on June 17, 1959, and the case finally reset for trial on September 8, 1959, at the beginning of the next term (R. 2–3). The conference complained of was alleged to have occurred on May 18, 1959, while the case was still pending for hearings and trial during the current term. The affidavit of bias and prejudice was not

[5] It is not claimed in petitioner's carefully-drawn affidavit that the merits or weight of the evidence was discussed at the conference, but even from such a claim it would be necessary, to find bias and prejudice, to take still another step and infer that the result of the discussion was to dispose the judge unfavorably towards the defendant. There is a question, indeed, whether even an actual predisposition against the defendant's case on the merits, formed from such an *ex parte* discussion of the evidence, would amount to "personal bias or prejudice" within the meaning of the statute, rather than simply reversible error. The prejudgment would be based, not on personal antagonism against the defendant, but on an appraisal of the evidence, albeit improperly presented to him. That is, the vice lies, not in the lack of dispassion, but in the impropriety and unfairness of the procedure, and it would seem to be more properly dealt with as such—*i.e.*, as a denial of a fair trial rather than as a disqualification of the judge for being personally biased or prejudiced.

filed, however, until August 27, 1959 (R. 3)—*i.e.*, not until after that term had ended and only shortly before the beginning of the next term. As a result, it could not be heard and acted upon until September 8, 1959, the very day on which the case was to and did begin trial.

Since the affidavit was predicated on the conference alleged to have taken place on May 18, 1959, there was obviously "good cause" for not filing it prior to that time. Some thirty days elapsed, however, before the pending motions (for dismissal, a bill of particulars, and production) were heard and before the case was finally set over for trial to the fall term, and no justification has been offered for failing to file the affidavit within that time.[6] Nor is that defect merely formal, for by waiting until the eleventh hour to challenge Judge Hoffman petitioner, if his motion were well-founded, would have caused the very evils that § 144 was designed to avoid. As filed, petition-

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[6] The affidavit does not claim that petitioner's counsel did not promptly learn of the conference having taken place. And since petitioner's asserted knowledge of the matters discussed at the conference could have come only from one of the participants—presumably, the Assistant United States Attorney—the implication is evident that no attempt was made to suppress the conference from petitioner.

Nor does the reliance in the affidavit (R. 19) on the concurring opinion in *Smith v. United States*, 360 U.S. 1, 17–18, decided June 8, 1959, provide "good cause" for the delay in filing the affidavit. That case had nothing to do with disqualifications for bias and prejudice under § 144, and certainly petitioner did not need the concurring opinion there to tell him that an *ex parte* conference, depending upon its nature and the matters discussed, *can* be prejudicial.

er's motion could not be acted upon until the very day that the trial was to begin and, if granted, would have required a continuance until the case could be reassigned. Presumably disqualification of Judge Hoffman at that point for bias and prejudice would also have required the various motions he had previously ruled upon—without challenge, although almost a month after the conference—to be resubmitted to another judge. It is precisely because of such wasteful and delay-causing consequences that untimely protests are foreclosed by § 144. See *Lipscomb* v. *United States*, 33 F. 2d 33, 34 (C.A. 8), and cases cited.

2. As already suggested, the question raised by the allegations in petitioner's affidavit seems to us not one of personal bias and prejudice—the mold into which petitioner, presumably to gain the procedural advantages of § 144, has attempted to force it—but simply one of judicial propriety or reversible error.

Not every *ex parte* communication between judge and prosecutor is *per se* error, and whether it is or not depends on the nature and circumstances of the communication.[1] *E.g.*, *Craven* v. *United States*, 22 F.

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[1] Canon 17 of the Canons of Judicial Ethics does not, as petitioner seems to imply, condemn all *ex parte* communications but only those "designed to influence * * * judicial action" (Pet. 14), and the propriety of the conference thus turns on its purpose.

Nor does the concurring opinion in *Smith* v. *United States*, 360 U.S. 1, 17–18, support petitioner's apparent view that any *ex parte* contact, regardless of its nature, is *per se* reversible error. In that case, three days after Smith's arrest for kidnapping, an F.B.I. agent had a private conference with the judge and discussed in detail both the facts of the case and

2d 600, 607. In this case, however, because of petitioner's own insistence that the matter be treated solely as one of the sufficiency on its face of the affidavit to satisfy the requirements of § 144, what ac-

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Smith's criminal background, including alleged previous acts of armed robbery and arson and convictions for violation of the Dyer Act and escaping from a federal prison (Record, No. 90, Oct. Term, 1958, pp. 207-208, 221-225, 231-232). Later the same day, Smith waived indictment, counsel, and venue and pleaded guilty to an information charging him with kidnapping. The trial judge, after a "stilted and formal colloquy" advising Smith of his rights (360 U.S. at 3), accepted the waivers and the plea, stated that the F.B.I. agent had already "gone over this case with me" (Record, No. 90, Oct. Term, 1958, p. 9) and that he was "really amazed" at Smith's "past criminal activities" (*id.*, p. 7), and immediately imposed a sentence of thirty years (*id.*, p. 9). The concurring opinion in this Court, after noting the private discussion between the judge and the F.B.I. agent "about Smith's background as well as his connection with the kidnapping", concluded that "such a private conference must be deemed presumptively prejudicial where, in violation of Fed. Rules Crim. Proc., 32(c)(1), it was conducted prior to the plea" (360 U.S. at 17-18).

Literally, all the concurring opinion said was that the particular conference was in the nature of a presentence report and therefore violated the express direction of Rule 32(c)(1) that a presentence report not be submitted to the judge until *after* the defendant has pleaded guilty or been found guilty. Even viewing the opinion more broadly, it does not condemn all private conferences but only "*such* a private conference" as the record in that case disclosed—*i.e.*, a discussion of the defendant's participation in the crime and his criminal background. There has been no allegation, much less a showing, that the conference here was of that nature.

The entire proceedings on the motion were as follows (R. 24):

> The COURT. I have looked at the petition, Mr. Calihan. Is there anything you want to say in support of it?
>
> Mr. CALIHAN [defense counsel]. I believe the cases,

tually occurred at the conference has never been made a matter of record. Moreover, for any purpose other than § 144, not even the bare and incomplete allegations of the affidavit are entitled to be taken as true. The affidavit was offered solely for purposes of § 144 and was uncontrovertible for that purpose, so that no opportunity to controvert the allegations was ever afforded the Government.

Nevertheless, but for minor particulars,[9] the Government does not now challenge the truth of the allegations of the affidavit. It is our position, rather, that even accepting the allegations at face value they do not establish impropriety or error.

a. The only allegation of the affidavit even remotely suggesting an impropriety occurring at the conference is the allegation that "things and matters relating to the quantum, nature and theory of the Government's proof in this cause were discussed" (R. 18–19). We have already pointed out that that allegation is entirely consistent with a simple inquiry as to when the judge proposed to bring the case to trial and an explanation, for that purpose, that the proof would be on the "net worth" theory and require calling hun-

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your Honor, particularly Cora *vs.* Hoffman indicate that there isn't much that I can say. The question is whether or not it is sufficient on its face.

The COURT. I think that is right. I am of the opinion that it isn't; therefore, I deny it.

[9] We are informed that the conference took place on May 12 instead of May 18, 1959, and that the papers the revenue agent had with him were unrelated to this case. Neither detail, however, seems significant.

dreds of witnesses to document thousands of alleged transactions. For that reason alone—*i.e.*, since the allegation is as consistent with a nonprejudicial conference as with a prejudicial one—the allegation is inadequate to establish prejudicial error.

However, because of petitioner's innuendos of impropriety, it is appropriate to point out that, even without going outside the record, it is evident that the innocuous explanation of the conference is by far the more likely one and that a meaningful discussion of the merits of the Government's proof within the space of a short conference would, in fact, have been a physical impossibility.

The Government's proof in this case, based on the net worth and expenditures method, was exceptionally complicated and difficult. It required tracing petitioner's transactions in 129 different securities (R. 73), and proof of a wide variety of personal expenditures, often relatively small individually, including such items as expenditures for women's clothing and accessories (R. 149–150), jewelry (R. 51–52), automobiles (R. 81, 96), insurance premiums on a variety of policies (R. 74–76, 79–80, 106), school tuition (R. 99, 101–102, 107), books (R. 111), redecorating and remodelling (R. 77–79, 97), etc. The proof, in short, amounted to reconstructing, from numerous and diverse sources, petitioner's complete financial life for the years involved (R. 65), an undertaking that was expected to require three months of trial to complete (R. 30). So complex was the proof that, as the defense counsel himself asserted (R. 72), a failure to prove even two or three of the

many transactions might prove fatal to the Government's case. In view of the complexity of the proof and the necessity of accounting for each of some hundreds of items to show a net omission from reported income, it was, we submit, physically impossible for a discussion of the "quantum, nature and theory of the Government's proof" (R. 19) in the course of a single conference with the judge to be anything more than a brief indication of the scope of the issues and the numbers and kinds of witnesses to be called and, therefore, of the probable time it would take to try the case. The impossibility within such a brief period of the details of the proof being discussed and their significance appraised is self-evident, but if confirmation is needed it is provided by the confession of defense counsel at the trial—some four months after the conference—that he himself did not yet understand "all the ramifications of these security transactions" and was "scrambling to keep up with things they [his associated tax counsel] have spent several years on" (R. 72). It is hardly to be supposed that the judge could have comprehended and formed an opinion about the same matters in the space of a single brief conference.

While foreclosing the possibility that the merits or details of the Government's proof could have been discussed at the conference, the record also provides an entirely innocent explanation for the conference. On May 18, 1959, the alleged date of the conference, the case was nominally set for trial on May 20. Defense counsel, however, was then engaged in another trial (R. 25), and the end of the term of court was

rapidly approaching. It was almost certain under the circumstances that the case would not be reached for trial that term, but would be, as it in fact was, continued from day to day until the end of the term and then be continued to the fall term (R. 2–3, 25). Because of the nature of the Government's proof, however—involving "thousands" of documents and "hundreds" of witnesses (R. 26) who would have to be subpoenaed from all parts of the country (R. 32, 65–66)—it would have been necessary to begin at once to prepare for trial and subpoena witnesses if there were any chance of the case actually being tried before the fall term.[10] It was of obvious concern to Government counsel, therefore, to know whether the judge had any intention of bringing the case to trial on short notice in the event that defense counsel should happen to be relieved of the trial in which he was then engaged. Thus, even though we are debarred from going outside the record, it may properly be pointed out that the record itself reflects the likely reason for the Assistant United States Attorney's visit to the judge's chambers. And, as noted above, a conference for that purpose—in which the nature of the case, the difficulties of preparation, and the probable length of trial would naturally be explained—is entirely consistent with all the allegations of the affidavit.[11] A conference

[10] Some three weeks of intensive preparation were required before the actual trial in September 1959 (R. 25–26, 32).

[11] Nor can anything sinister be inferred from the presence of Agent Weber at the conference. As the petitioner's affidavit itself states, Weber was in "charge" of the investigation and preparation of the case (R. 18) and was therefore the

of that nature and for that purpose would, in turn, plainly not have been improper or prejudicial.[12]

In summary, while the record does not affirmatively disclose that the conference was limited to an inquiry as to the scheduling of the case, it does, we think, completely negative the possibility that any meaningful, much less prejudicial, discussion of the merits of the case could have taken place. At the same time it suggests an innocent explanation of the conference that is fully consistent with the allegations of the affidavit, thus demonstrating that petitioner's allegations do not show any impropriety on the part either of Government counsel or of the judge.

b. We acknowledge that, even though the conference was, as we believe, entirely proper, it would have been desirable, when a question about it was raised, for the judge and Government counsel to have stated upon the record what in fact occurred at the conference. Petitioner, however, did not ask for such

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person most familiar with the details of the case, how long would be required for trial, and how rapidly the Government could subpoena the necessary witnesses and be ready for trial.

[12] In terms of the Canons of Judicial Ethics relied on by petitioner (Pet. 14) such an inquiry into the judge's planned schedule would not be a communication "designed to influence his judicial action." Arguably, perhaps, it might be said to have been "designed" to induce the judge immediately to announce a continuance to the fall term rather than continue the case from day to day until the end of the term, but the interests of the prosecution and the defense were obviously not adverse on that matter. Defense counsel was then engaged in the trial of another case which lasted past the close of the term (R. 25), and even by the time the case was called in September he claimed still not to have had time adequately to prepare (R. 24–25).

clarification but chose instead to utilize the bare fact that the conference occurred to force Judge Hoffman's disqualification without further inquiry. He stood upon his claim that the only question was the sufficiency of the affidavit under § 144, and, when the judge correctly held that it was insufficient, raised no question whether what in fact occurred at the conference was improper (R. 24). He cannot now, therefore, complain that the record fails to show what happened at the conference.

Nor is that a result, we believe, of a mere pleader's error. Petitioner was represented throughout the proceedings by able lawyers, both criminal and tax specialists, who, as the record shows, left no stone unturned in their defense of petitioner's rights. It can fairly be assumed that they chose to proceed under § 144, not through a misconception, but for good and sufficient reasons, and there are two aspects of the affidavit filed that readily suggest what those reasons might have been:

First is the fact that the affidavit alleges personal information of what matters were discussed at the conference (R. 18–19). That information could have come only from one of the participants, presumably the Assistant United States Attorney. It is inconceivable, we submit, that the Assistant United States Attorney would have told petitioner's counsel that "matters relating to the quantum, nature and theory of the Government's proof" were discussed without stating the purpose of the conference and the nature of the discussion; that petitioner's counsel would have

been satisfied with such a vague statement; or that, if the Assistant United States Attorney had refused to say more, petitioner would not have objected to that suppression of the facts in his affidavit.

Second, petitioner's affidavit, closely read, carefully avoids any direct allegations that what went on at the conference—as distinguished from there being a conference at all—was improper or prejudicial. The main thrust of the affidavit is that Judge Hoffman had demonstrated in other cases a general bias against criminal defendants; the fact of the conference is used simply as "evidence" of that general bias (¶ 9, R. 19). The suggestion that what *occurred* at the conference might have been prejudicial—if suggested at all—is left to innuendo and inference.

From the fact that the affidavit does not allege either that petitioner's counsel were not informed of what occurred at the conference or that what occurred was improper, it can be inferred, we submit, that they were so informed; that they concluded that the propriety of what occurred at the conference could not successfully be directly challenged; and that the generalized statement in the affidavit that "matters relating to the quantum, nature and theory of the Government's proof" were discussed (R. 19) reflects, not the limit of petitioner's knowledge, but simply the strongest statement that could be made within the bounds of literal accuracy. That, in turn, would fully explain why petitioner chose to stand on the contention that the fact of the conference being held, without more, required Judge Hoffman to recuse

himself under § 144, and not to claim that anything prejudicial or improper actually occurred at the conference. He must here stand on that same contention and cannot draw support from the fact that, because he proceeded under § 144, the record fails to disclose what did happen.

3. The court of appeals, in addition to holding that a conference between judge and prosecutor is not enough, by itself, to ground "an inference of improper scheming" (Pet. 7a),[13] went on to hold that, in any event, "the trial court's denial of the motion to reassign the case does not, even if erroneous, raise a jurisdictional question," and that any error was therefore waived by the voluntary plea of guilty. Lumping together all matters which the courts sometimes refer to as questions of "jurisdiction" or "power", petitioner asserts a conflict among the courts of appeals on the question whether a sufficient affidavit of bias and prejudice under § 144 deprives a court of "jurisdiction." While even at that broad level there is, we think, no conflict,[14] it is sufficient to note that

[13] The cited statement is, we think, a clear ruling that the affidavit was insufficient. As Judge Schnackenberg observed in his opinion on denial of rehearing (Pet. 9a), petitioner is in error in claiming that the court of appeals "refused to rule on the sufficiency of the affidavit" (Pet. 13).

[14] *Green* v. *Murphy*, 259 F. 2d 591, 593 (C.A. 3), and *Korer* v. *Hoffman*, 212 F. 2d 211, 212–213 (C.A. 7), hold, with the court below, that an affidavit under § 144, even though legally sufficient, does not operate to deprive the court of jurisdiction. Cf. *Sexton* v. *Barry*, 233 F. 2d 220, 225 (C.A. 6), certiorari denied, 352 U.S. 870, and cases there cited. Petitioner relies for a conflict primarily on *Connelly* v. *United States District Court*, 191 F. 2d 692, 696 (C.A. 9), and *Stringer* v. *United States*, 233 F. 2d 947 (C.A. 9) (Pet. 16–17). In *Connelly*, the

none of the cases relied upon involved the particular question here whether alleged error in denying such a motion survives a subsequent plea of guilty.[15]

Even on the question of the effect of a plea of guilty on a previously-denied affidavit of bias and prejudice, petitioner's argument ignores possible distinctions based on the nature of the underlying allegations of bias. In this case, the very most the affidavit alleges is that the judge may have been exposed to some part of the Government's evidence and that that might influence his conduct of the trial. Even if that were a sufficient ground for disqualification under § 144, we do not understand how that assumed "preview" of the Government's case could possibly have influenced the subsequent proceedings when, four months later, after two weeks of trial and with full advice of counsel, petitioner changed his plea to guilty, thereby admitting the very matters on which the judge was claimed to be predisposed.[16] That is, whether or not a plea of guilty

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court of appeals, finding the affidavit sufficient, issued a writ of prohibition against the trial judge's taking any *further* action in the case, the very remedy prescribed by § 144. There was no question of the status or effect of any action already taken by the judge after the filing of the affidavit. *Stringer* involved a different statute, and the abbreviated opinion relates only scanty facts.

[15] *Carroll* v. *Zerbst*, 76 F. 2d 961 (C.A. 10), said to have dictum on that question (Pet. 17), contains at most whatever negative implication can be found in a holding that a § 144 motion directed against one judge does not affect a guilty plea entered before another.

[16] This case is readily distinguishable from *Smith* v. *United States*, *supra*, note 7, relied on by petitioner (Pet. 16), by the nature of the conference, the assistance of counsel, the deliber-

precludes in all cases (*e.g.*, even in a case where personal antagonism is alleged) any objection to a prior denial of a § 144 motion, it is clear that in this case any error in the denial of the motion could not have been prejudicial to petitioner in the proceedings after his plea of guilty.

4. After about two weeks of trial, petitioner moved for a mistrial on the ground that he was physically unable to continue trial.[17] After receiving a tendered report of the Mayo Clinic and the testimony of petitioner (himself a doctor) and two of his colleagues whom he had previously consulted, the district judge denied the motion (R. 206). The following day, petitioner withdrew his plea of not guilty and entered a plea of guilty, which was duly accepted (R. 207–211). Petitioner contends that the denial of the motion for a mistrial was error and, in effect, coerced him into pleading guilty in order to avoid jeopardizing his health (Pet. 22–23).

a. The medical evidence, we submit, was totally inadequate to require a discontinuance of the trial. It did tend to show that petitioner suffered from arteriosclerotic cardiovascular disease, the most com-

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ateness of the action in pleading guilty, and the time lapse between the conference and the proceedings on the guilty plea.

[17] R. 198–200. Petitioner had earlier phrased his motion as one for a continuance to permit his examination by a Government doctor (R. 112–114, 143–148), but that of course looked towards the same ultimate relief. Petitioner seems to imply some independent error in not requiring a Government examination, but obviously no such examination was required until petitioner made a sufficient showing of his inability to stand trial and the Government undertook to rebut it.

mon of heart diseases (R. 184), and that that disease, even though classified as "mild" in petitioner's case (R. 194–195), could at any time prove fatal. But on the crucial question of the effect of the emotional strain of a trial on petitioner's condition and the likelihood of that strain provoking a fatal attack, the evidence was at best highly speculative and equivocal.

The Mayo report, although reflecting an awareness that the purpose of the examination was to determine petitioner's ability to stand trial, contains no suggestion of disability but, to the contrary, concluded that petitioner "was getting along satisfactorily" (R. 245). Petitioner, offering a self-diagnosis, suggested that a fatal attack as a result of the trial was "certainly a possibility" but disclaimed any knowledge of the effect of emotional strain on the disease (R. 119, 123). Dr. Heenahan, one of the petitioner's own witnesses, went further and affirmatively stated that nothing was known about the relationship of emotional strain to the disease (R. 195).

Petitioner's primary reliance, of necessity, is placed on the testimony of Dr. Nelson. Read as a whole, however (see Statement, *supra,* pp. 7–9), that testimony amounts to no more than an expression of opinion, unsupported by medical analysis or an explanation of causal relationships, that it was possible, though unlikely, that the strain of the trial could provoke a heart attack. While Dr. Nelson did testify that the trial would "seriously jeopardize" petitioner's health, he had previously indicated that he would consider it serious "if there is one chance in one hundred that a life is jeopardized", so even that opinion

reflected only a statistical possibility, admittedly remote, of causing death. Moreover, Dr. Nelson was apparently talking about the possible effect of a "severe emotional strain" (R. 169), and there is no evidence that the trial was a "severe" emotional strain to petitioner. Petitioner himself testified that the trial had not "disturbed [him] mentally too much" (R. 138). Even more significantly, petitioner had continued to practice medicine in the evenings and on the weekends during the trial, hardly the conduct of a man emotionally and physically exhausted by the trial and fearful that the strain will kill him.

There was thus neither a showing that petitioner was undergoing severe emotional strain as a result of the trial nor any objective evidence of the effect of emotional strain upon his heart condition—unless Dr. Nelson's belief that there was a statistically-remote "possibility" of ill effects be considered such evidence. The evidence was perhaps best summed up by defense counsel, who, after hearing the testimony of the doctors, could only say that "I am not convinced from what I have heard here that this *could not be* a fatal situation" (R. 195; emphasis added). The burden, however, was on the defense to show some reasonable probability of serious medical consequences, not on the Government to foreclose every statistical possibility. Unless it is to be declared to be an absolute rule that every heart patient must be excused from criminal prosecution,[18] the evidence here, we

[18] The question, it should be noted, is not one simply of delaying the trial, for the disease is a progressive one. If petitioner could not be tried at the time of this trial, he could never be tried.

submit, was plainly insufficient to require termination of the prosecution. The matter is one for the sound, responsible discretion of the trial judge. In this case Judge Hoffman was fully aware of his responsibility, and the record shows that he discharged it most carefully.

b. To buttress the claim that he was coerced by fear for his health to plead guilty, petitioner seizes upon his statement—made after the guilty plea was accepted and he was asked if he had anything to say—that "Well, I just can't go on with this" (R. 211). Depending upon the speaker's inflection, tone of voice, and demeanor, that of course could reflect any number of things—a weariness with his pose of innocence; the absurdity of continuing a trial the outcome of which was no longer in doubt; the emotional strain on himself and his family; a desire to get the inevitable done and over with; or, indeed, simply a noncommittal shrug of the shoulders. As delivered, it apparently sounded quite unexceptional, for neither judge, prosecutor, nor defense counsel took note of it. Even thirty days later, defense counsel had not yet found the awesome implications they now attribute to the statement (evidence that petitioner pleaded guilty because he feared for his life if the trial continued), for they failed even to mention the incident in their otherwise exhaustive motion to vacate the sentence and allow withdrawal of the guilty plea (R. 237-242).

Moreover, petitioner had himself testified at length on his physical condition only three trial days earlier, and his testimony reveals, not a man oppressed and driven to rash action by a fear of imminent death,

but a man fully accustomed to, and able objectively to appraise, the liabilities to which his heart disease made him subject. Although he considered a fatal attack during the trial as "certainly a possibility", it was something that "can happen to anybody" with his condition and "something I have looked forward to for some time" (R. 119). He was not "too much" disturbed mentally by the trial (R. 138–139) and had not even asked his counsel to tell the court about the possibility of his death, leaving that "entirely up to their discretion" (R. 142). In short, his testimony shows that, although he was aware of death as an ever-present possibility with a heart disease of his kind, he apparently did not view it as a particularly likely occurrence. And if his "fear" of death was not great enough to induce him to give up evening and week-end practice of medicine to minimize the strain, it is difficult to believe that it was so great as to induce him to plead guilty to a crime he did not commit.

Finally, the change of plea came, not as a rash impulse of the moment, but as a deliberate action following weeks of consideration by counsel. On several occasions during the trial, defense counsel had endeavored to obtain a recommendation of probation from the Department of Justice or some indication from the judge of the sentence he would impose in the event of a guilty plea (R. 82–91). The change of plea was made with full advice of counsel (R. 238–239) and was, indeed, tendered by counsel (R. 207). If it was the product, not of a considered judgment that defense was fruitless, but of an irrational impulse prompted by fear of death, defense counsel, one may

suppose, would have been fully aware of it and would not have permitted the plea to be entered without raising a question as to petitioner's responsibility.

5. The plea of guilty was entered on September 22, 1959 (R. 6). On October 22, thirty days later, the court sentenced petitioner to imprisonment for a year and a day (R. 7, 217). Within minutes of the sentencing, petitioner collapsed (*not* from a heart attack, see note 2, *supra*) and was immediately transferred to a hospital (R. 218–223, 240). The following morning, on October 23, defense counsel filed, on behalf of petitioner, a motion to vacate the sentence and permit withdrawal of the plea of guilty (R. 7, 237–243).

The motion represented, in substance, that at the time of the plea petitioner was physically unable to "endure further participation" in the trial, was mentally disturbed, and believed that continuance of the trial would cause his death, and that his plea of guilty "was made upon an irrational impulse caused by his mental disturbance and physical fear" (R. 237–238). It was contended for those reasons that the plea was "coerced and induced by his physical and mental condition" and was not "voluntarily and understandingly made" and that the judgment and sentence should therefore be vacated and petitioner be allowed to withdraw his plea (R. 242).[19]

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[19] The motion also alleged that petitioner had been misled by statements of the judge and the prosecutor into believing that he would not be given a jail sentence if he pleaded guilty. The factual allegations offered in support of the claim, simply excerpts from the record (R. 239), are on their face inadequate to support the claim. The claim is in any event, as Judge

Since, as the motion recites, petitioner had collapsed within minutes after the sentencing and was still in critical condition at the time the motion was filed (R. 240), the motion could be and was signed only by defense counsel (R. 242). Facts alleged to be within petitioner's personal knowledge were attested to have been based "upon communications made to [defense counsel] by the defendant" (R. 243).

a. The motion to withdraw the plea of guilty reflects, we submit, an overt disregard of the Federal Rules of Criminal Procedure. This is not a case of a guilty plea being entered before trial or without assistance of counsel. The plea was entered with full advice and acquiescence of counsel and only after two weeks of trial. Because of the plea a laboriously prepared trial, for which hundreds of subpoenas had been issued, was aborted and the jury discharged. Plainly defense counsel had a heavy obligation to the court to call to its attention any questions of the propriety of the plea before allowing such action to be taken.

Even more significant was the failure to move for withdrawal of the plea at any time during the thirty days that elapsed between the plea and sentencing. Rule 32(d) of the Federal Rules of Criminal Procedure provides:

> (d) *Withdrawal of Plea of Guilty.* A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is

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Hoffman pointed out in denying the motion (R. 229-230), fully refuted by the record (see R. 82-91, 210-214), and will not be further discussed.

> imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

Not only was the motion not filed within the time required by the Rule, but petitioner offers not the slightest reason for the failure to do so. In that respect, indeed, the motion is a most remarkable one, for it expressly *admits* that all the facts alleged as the basis of the motion[20] were communicated to counsel *before* sentencing. That appears in the attestation that the motion is based on facts communicated to counsel by the petitioner (R. 243), combined with the acknowledgment that petitioner had been incommunicado since the sentencing (R. 240).[21] In short, the motion is an overt assertion that Rule 32(d) means nothing and that the defendant may at will wait to see what sentence is imposed and then decide whether to withdraw the plea. In the circumstances, we submit, the district judge would have been fully justified in refusing to consider the motion at all and dismissing it as a flagrant violation of Rule 32(d).

b. Assuming the motion was entitled to be heard on the merits, it was properly denied. Petitioner

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[20] Except, of course, those based on the sentence imposed. See note 19, *supra*.

[21] At the very latest, defense counsel had learned of petitioner's alleged claims of irrationality at least by the time the sentencing hearing commenced. Yet when asked what he had to say, he replied only that petitioner would "throw himself on the mercy of the Court" (R. 213).

objects that no hearing was held on the allegations. The short answer is that none was asked for, either in the motion itself or in the oral argument on the motion (R. 223–233). In any event, there was no need for a hearing. The claims as to petitioner's physical condition were fully explored at the trial and no further offer of proof was made. Similarly, the judge had had a full opportunity, through petitioner's own contemporaneous testimony on his physical condition and state of mind and his demeanor and conduct in pleading guilty, to determine the voluntariness of the plea. The only thing new even suggested by the motion was petitioner's own assertion that he had acted under an "irrational impulse" and that could hardly overcome the force of his contemporaneous action and testimony.

But even if it be assumed that petitioner could somehow prove—in a hearing he did not request—that he had acted pursuant to an irrational impulse, that would still not entitle him to be relieved of the plea. Even if "irrational" at the time of the plea, petitioner presumably became rational at least by the time—sometime before the sentencing—that he realized his own prior irrationality and informed counsel that his plea had been "coerced." Since counsel did not then move to withdraw the plea, one must assume that petitioner instructed him not to do so.[22] That

[22] Petitioner himself, moreover, when asked at the sentencing hearing if he had anything to say, impliedly reaffirmed his plea by saying only that he was "sorry" that it had happened and in no way qualifying the plea (R. 213). As we have noted, his asserted communication to defense counsel that the plea was the product of irrationality was necessarily made, if at all, sometime prior to that.

decision to allow the plea to stand after the "true" facts came to light—persisted in until the time for withdrawal of the plea allowed by the Federal Rules expired—clearly amounted, we submit, to a ratification of the plea and removed whatever defects it may have had at the time it was entered. Not only was no "manifest injustice" shown, but it would have been, we submit, a manifest violation of proper procedures to have allowed the plea to be withdrawn.

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted.

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NOVEMBER, 1960.

U.S. GOVERNMENT PRINTING OFFICE: 1960

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 369

ROBERT C. HETHERINGTON,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO THE BRIEF OF THE UNITED STATES IN OPPOSITION

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Your Petitioner, in the reply brief, does not propose to repeat here arguments previously advanced in the Petition. However, the Government, in its brief in opposition to the grant of certiorari, has injected new matter into the case, to some of which it is deemed desirable to make a reply.

I. In the *questions* presented to this Court by the respondent, United States of America, the following appears:

> "2. Whether the affidavit was timely filed under 28 U. S. C. 144, where no good cause was shown for failure to file it during the term of court at which the case was originally set for trial and at which pretrial motions were heard." (P. 2).

The Government may not now raise, for the first time, the question of the timeliness of petitioner's affidavit of bias and prejudice. The Government made no such contention in the District Court or in the Court of Appeals, but seeks to raise the question for the first time in its brief opposing the grant of certiorari. The short answer to the Government's contention is that it is raised too late. While the timeliness of petitioner's affidavit was never in question in either of the courts below, the Court of Appeals has made a finding heretofore unchallenged, that petitioner "made a *timely* motion accompanied by an affidavit pursuant to Section 44 of Title 28 . . ." (Pet. 1a-2a) (emphasis added).

A. No suggestion has heretofore been made that the filing of the motion was for purposes of delay as contended by respondent. (See Brief pp. 17-18.)

B. Failure to object on grounds of untimeliness concedes that under the circumstances the affidavit was timely.

II. Petitioner's affidavit of bias and prejudice was timely filed under 28 U. S. C. 144.

28 U. S. C. 144 requires that an affidavit of bias and prejudice be filed "not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time." "Good cause" is not required to be shown where the affidavit was filed more "than ten days before the beginning of the term *at which the proceeding is to be heard*. . . ." (28 U. S. C. 144). This section does not refer to the term at which the case was originally set, as the United States suggests, but specifically refers to the term at which the proceedings are to be heard. The affidavit here was filed well in advance

of 10 days prior to the term of court at which the trial was scheduled to be had. This amazing contention of the government is made, notwithstanding its admitted recognition that trial would be had not earlier than the term to which we refer. (Respondent's Brief, p. 23)

The case was set for trial on September 8, 1959 (R. 3) which was the beginning of a term (Respondent's Brief, p. 16). The affidavit was filed August 27, 1959, more than ten days before the beginning of the term. Obviously, as the affidavit was filed within the time specified by the statute, it was unnecessary to show "good cause" for filing it late.

In support of its position, respondent cites only *Lipscomb* v. *United States*, 33 F. 2d 33, 34 (8 Cir. 1929) "and cases cited." Neither the *Lipscomb* case, nor either of the two cases cited therein is remotely in point. In *Lipscomb* the affidavit was filed five days before the trial. In *Bishop* v. *United States*, 16 F. 2d 410, 411 (8 Cir. 1926) and *Rossi* v. *United States*, 16 F. 2d 712, 716 (8 Cir. 1926), the two cases cited in *Lipscomb*, the affidavit was filed on the day of the trial.

Significantly, while indirectly citing *Bishop* v. *United States*, *supra*, the government overlooks the following language at page 411:

> "We think the expression of the court in *Chatin* v. *United States* (4th Circuit) 5 F. (2d) 592, 595, clearly states the reasonable construction of the statute: 'The fair and reasonable construction of the statute is that, when the indictment is found ten days or more before the term begins at which the case is to be called for trial, the affidavit must be filed 10 days before the beginning of the term, or good cause shown for the delay; when the indictment is found less than 10 days before such term begins, the affidavit must be filed as soon as practicable before the term begins.

> or good cause shown for the delay; when the indictment is found after the term has begun, the affidavit must be filed as soon as the disqualifying facts are known, or good cause shown for delay.'"

In the case at bar, the indictment was found (R. 1) more than ten days before September 8, 1959, the beginning of the term at which the case was called for trial, and the affidavit was filed on August 27, 1959, also more than ten days before the beginning of that term, thus fully complying with the rule of the *Bishop* and *Chan* cases.

III. There was no "ratification" by petitioner of the plea of guilty.

Respondent stresses the fact that thirty days elapsed after the plea before petitioner made any formal claim that the plea was the result of coercion, and did not seek to change his plea until sentence had been passed. Therefore, the government argues, there was a "ratification" of the plea. (Respondent's Brief, 38). Such a point would be well taken if the plea had been procured by a more classical type of coercion, *e.g.* a beating, which, once inflicted, is over and done. But respondent's reasoning is not applicable where the coercion is continuous. Petitioner's disease is a heart condition, which respondent admits is progressive (Respondent's Brief, page 31, footnote 31), and the threat of injury or death as the result of a trial was continuous and was just as real throughout those thirty days and on the day of sentencing as it had been on the day the plea was taken. Petitioner still had the same sword hanging over him until the case was finally disposed of.

IV. Respondent's brief exceeds and misconstrues the record in the following particulars:

A. At page 14, the government interprets the defendant's allegation that Judge Hoffman has in other cases exhibited a personal bias for the government and against the defendant as no more than an assertion that Judge Hoffman has a reputation as a "hard" judge. This interpretation is patently erroneous. The assertion of the defendant was made with particular and express reliance upon *United States* v. *Carmel*, 267 F. 3d 345, wherein the actions of Judge Hoffman were determined by the United States Court of Appeals for the Seventh Circuit to have destroyed *the atmosphere of impartiality*. The behavior of the trial judge in the courtroom during the *Carmel* case is an inescapable part of the setting within which the defendant inferred bias from the *ex parte* conference with government counsel and the principal government witness in his own case.

B. At page 21, the government interprets the allegation that "things and matters relating to the quantum nature and theory of the government's proof in this cause were discussed" as consistent with a nonprejudicial conference as with a prejudicial one. In support of this argument the government submits that the judge could not have comprehended so complicated a case as that presented here in a short time and have formed an opinion thereon. The argument lacks merit, for nothing is so well known as the danger of a little knowledge. It also suggests that government counsel was obviously concerned with whether the judge had any intention of bringing the case to trial on short notice. The want of merit in this suggestion is the equally obvious concern of *defense counsel* about any such intention of the judge. The government further suggests that defense counsel chose to foreclose clarification as to what occurred at the conference. The want of merit in that suggestion is that

defense counsel recognized that he is not entitled to know. No hearing could be had on the affidavit. It was not insistence of defense counsel that required the affidavit to be treated solely as one of sufficiency on its face (see government brief, pp. 19-20). It was insistence of the statute that so required. There was no manner in which this information could have been given, save by the voluntary action of those persons who attended the conference. No such action was taken.

C. At page 11 of its brief the government argues it was initially reported that "the collapse was caused by a heart attack but by the following day it was learned that that was not the reason. Because of defense counsel's objection that disclosure of the true reason for the collapse would be slanderous, however, the actual cause of the collapse is not disclosed by the record." Later, the government argues that the cause of the collapse was not a heart attack. We respectfully submit that the government cannot state with certainty or upon appropriate evidence the cause of the collapse. We further respectfully submit that "disclosure of the true reason for the collapse," as the government elects to designate it, was not foreclosed by defense counsel's objection, but by recognition of the trial court that the offer of information by the United States Attorney did not constitute competent evidence.*

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* Mr. Purcell: . . . Throughout this motion there is reference to cardiac disturbance.

"The Court: Yes. Let me have that, then. **I will permit you to read that.** Is that a report from the attending physician?

"Mr. Purcell: No, your honor.

"Mr. Barnett: No, sir, it is a notation of the marshal's conversation with Dr. Jack.

"The Court: I am not called at this moment to pass upon that. I am called to rule upon this motion." (App. 232-233)

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted.

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